

FILED

JUL 27 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

LARRY EARL CLIMMONS,

Petitioner - Appellant,

v.

LARRY SMALL, Warden,

Respondent - Appellee.

No. 01-56598

D.C. No. CV-00-12993-CBM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Chief District Judge, Presiding

Submitted July 24, 2006^{**}

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

California prisoner Larry Earl Climmons appeals from the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition as untimely. We have jurisdiction under 28 U.S.C. § 2253, and we affirm on other grounds supported by the record.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Climmons contends that he was entitled to statutory tolling for the three-year time period between the April 30, 1997, denial of his habeas petition by the California Superior Court, and the filing of his next habeas petition in the California Supreme Court on November 10, 1999. Although this contention would likely fail under the Supreme Court's recent decision in *Evans v. Chavis*, 126 S. Ct. 846, 854 (2006), we need not reach this issue because we conclude that, even allowing for tolling of this period, Climmons' petition would still be untimely. *See* 28 U.S.C. § 2244(d)(2). Accordingly, we affirm the district court's judgment.

We construe Climmons' uncertified contentions as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. 22-1(e); *see also* *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.